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PANAMA TOLLS QUESTION

It is probable that the impartial historian will come to the conclusion that there is a great deal to be said for the American contention regarding the Panama Tolls. The acquisition of the Canal Zone, let it be observed at once, does not seem to affect the position. The liabilities of the United States in the isthmus could scarcely be affected by their own act.

But what are those liabilities? The Treaties of 1850 and 1901 are so badly drawn, and are expressed in such a slovenly way, as to make it far from an easy matter to pronounce off-hand upon questions of their interpretation. It seems not unfair to conclude that the negotiators designedly used ambiguous language, in order to put off until another time the necessity of arriving at a really clear and complete understanding. The Treaty of 1850 contained a loose and vague aspiration (Clause VIII), quite out of place in a business instrument. The Treaty of 1901 is even worse drafted. Acclaimed at the time as a monument to Pauncefote's statesmanship and discretion, it now reveals itself as having raised more difficulties than it laid, and as having made confusion worse confounded.

The Treaty of 1850, in its practical clauses (I to VII) deals with Central America and with Central America only. American capitalists were contemplating a Nicaraguan canal. Palmerston stupidly blocked it by invoking the "rights" of an engaging tribe of savages whom he suddenly discovered (without a scintilla of evidence) to be allies of Great Britain, and who have long since been willingly abandoned to Nicaragua. For the modest *quid pro quo* implied in the removal of this block, Mr. Clayton conceded the self-denying clauses of the *Clayton-Bulwer Treaty* of

1850. So far as these clauses were practical, they were limited to Central America.

Now "Central America" was not a loose expression. It had a quite definite and well-known meaning. There had recently existed a state styled "Central America" composing the territory of Gautumala, Honduras, San Salvador, Costa Rica and Nicaragua. And this is what the negotiators meant. They were not thinking of Panama. Demonstrably this is so. Mr. Clayton's dispatch of July, 1850, to Sir H. Bulwer expressly states that the expression "was intended to and does include all the Central American States of Guatemala, Honduras, San Salvador, Nicaragua and Costa Rica".

But in the unfortunate Article VIII, which is little more than a literary flourish, they looked beyond "Central America".

"VIII. The Governments of Great Britain and the United States having not only desired, in entering into this convention, to accomplish a general object, but also to establish a general principle,—they hereby agree to extend their protection by treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America,—and more especially to the inter-oceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by Great Britain and the United States that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of as just and equitable; and that the same canals or railways, being open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on like terms to the subjects and citizens of every other state which is willing to grant thereto such protection as Great Britain and the United States engage to afford."

Let us analyze this remarkable section a little closely. It pretty obviously contemplates, in the first place, a canal constructed by private capital. The whole treaty does that. The whole treaty is free from any trace of the conception of a National Canal. It is pre-occupied with the possibility of a private company constructing the canal and charging monopolistic rates which might be discriminative, but which might be equally objectionable as extortionate. Even in the main body of the treaty (Arts. I-VII) all that the contracting parties undertake—besides the repudia-

tion of exclusive control or advantages—is to protect the projected Central American Canal, but not to protect it unless it is reasonably and fairly worked. Protection, in those disturbed regions, was obviously a necessity for private persons. If additional proof were needed, it will be found in the fact that Art. III speaks of "the parties" undertaking the work; Art. V of "the persons or company" undertaking or managing the same; Art. VII of to "persons or company" offering to commence the same; and Art. VIII of "the parties" constructing or owning the canal.

In perfect accordance with this general scheme, the contracting parties agree in Art. VIII to protect any other inter-oceanic communication, constructed, it is implied, by private persons,—so long as those private persons act in a reasonable and fair spirit towards commerce, but not otherwise.

Observe, there is no word in Art. VIII about disclaiming control. That provision extended only to "Central America". Quite reasonably: for it was in that region that Britain had affected to exercise control, and it was in respect of that region that it was necessary to disclaim it. In exchange for Britain's disclaimer of her shadowy protectorate in Mosquito, the states gave up the right to acquire control in all Central America. But it is not likely that they thought of giving up, in return for this slender concession, the right to acquire by lawful means control throughout the rest of the two Americas! If the Art. VIII meant to extend to the whole of the Americas the scheme established by Arts. I-VIII for Central America, then Britain should at once have retired from Canada, Guiana, and the Falkland Islands! If the treaty did not mean that, then Art. VIII does not extend the *régime* of equal canal rates established by Arts. I and VII beyond Central America—and therefore not to Panama. It is only the joint protection, established in Art. VII, and totally unconnected with the repudiation of special advantages contained in Art. I, that by Art. VIII they extend to Panama and other inter-oceanic canals.

Proof positive is afforded by the existence of the Panama Railway. This comes under Art. VIII. But no one thinks of the Clayton-Bulwer Treaty in connection with it: because all that it provides is a platonic joint protection which has never been required or invoked.

The whole scheme of Art. VIII is executory. Its objects are to be carried out, as the occasion arises, "by treaty stipulations" *in futuro,* suited to the requirements of each particular case. And always the idea of private ownership is present. Both countries agree, in a vague manner, to come to a future understanding as to "protecting" the hypothetical private "constructors and owners" of future canals and railroads. Only they make it clear that they will only protect them if they are unreasonable.

It follows that if either government constructed a canal itself, no "protection" would be required, and no question as to the terms on which it should be conceded would arise. Art. VIII, then, (1) is executory and commits the signatories to nothing: (2) it only lays down the terms of "protection": (3) it is inapplicable to the case of construction by governments.

Both Mr. Blaine and Mr. Frelinghuysen strongly asserted the first of these three propositions in 1881-2.[1]

Now if matters stood there, things would be simple. It might be a shock to Great Britain to learn that the Panama Canal was outside the scope of all the effective clauses of the Treaty of 1850: but it would be very difficult to escape the conclusion, when once the instrument is calmly scrutinized. The analogy of the Panama Railroad would have been almost conclusive.

But then we have to consider the Treaty of 1901.

By Art. I, this swept away the Clayton-Bulwer Treaty of 1850. As to the absolute and positive effect of this there can be no question. Even if the rest of the treaty were to fail of effect, this first provision would, I think, still hold good. Then the treaty begins to flounder.

We must go back to the preamble. It recites that the treaty is concluded in order to get rid of any objections which might arise to the United States constructing or subsidizing the construction of an inter-oceanic canal, on account of the Clayton-Bulwer Treaty. Now we have just seen that that treaty had nothing to say to the construction of such a canal outside "Central America": except that the contracting powers pledged themselves to "protect" such a canal, so long as it was fairly worked by those who constructed and owned it. Therefore it could only be a Central American canal which the United States were precluded from, or hampered in, constructing, by that treaty. Art. I of the Clayton-Bulwer Treaty certainly did so hamper them. For it dis-

[1] Despatches to Mr. Lowell, 19 Nov., 1881; 29 Nov., 1881; 8 May, 1882.

tinctly provided that they should exercise no influence or control in Central America. When, therefore, the preamble speaks of "a canal", it means a Central American canal. The treaty was not needed in respect of any other. Nor can it be supposed for a moment that the United States meant to limit their free right of constructing a canal, say, from Chicago to San Francisco, should the progress of science make it economically possible. The Treaty of 1901 was merely concluded to remove the disabilities imposed in 1850. And these only concerned Central America. In point of fact, it was the Lakes route *via* Nicaragua which was, at the moment of the Hay-Pauncefote Treaty of 1901, most talked about.

Therefore when Art. I says that "the" canal may be constructed by the United States, it means this canal—a canal which they cannot construct without the new treaty—a canal in "Central America."

The wording of the treaty is deplorably bad. It speaks of "the canal", as though only one could ever be made. But it cannot refer to every inter-oceanic canal that may ever be made in the future. It is very extraordinary that Britain undertakes no corresponding obligations. She can apparently build a canal or a ship-railway across Mexico or Colombia, or even across Nicaragua or Honduras, and discriminate as much as she likes in the tolls charged.

So far as the canal contemplated by the Hay-Pauncefote Treaty is concerned, nothing is said about equality of charges until we come to Art. III. And then the provision takes the remarkable form of a sort of condition upon which the canal will be regarded by Great Britain as free from attack in time of war. That is, the proviso for equal charges is not a straightforward agreement, but it is introduced in an oblique and—if the expression may be forgiven—"slinking" manner, as "the basis of the neutralization of such ship-canal".

Now neutralization refers to a state of war. All that Art. III necessarily imports, therefore, is that Britain would be justified in disregarding the artificial "neutrality" of the canal, if its terms were infringed. It gives Britain no absolute right to insist on equal charges. All that it says is that she may disregard its quasi-neutrality, and attack it in war, if its charges have not complied with the condition or "basis" of neutralization.

But suppose we concede that "neutralization" has a peculiar meaning in this article. We shall have to concede, at the same time, that the minds of the negotiators were in a state of complete muddle;—but that is far from an impossible supposition. Suppose we concede that "neutralization" does not refer to war alone, but that it connotes a certain "internationalization" in time of peace, can we not then construe the article as containing a positive engagement to charge equal tolls?

I think we can: but it is a violent supposition.

Every one of the other five clauses of this wretched Article III distinctly and solely refer to a state of war! The inference is irresistible that "neutralization" means "treatment as neutral in war-time". In that case, the provision for equal tolls, as the "basis" of such neutralization.

There is only one thing against that inference, and that is the astonishing fact that the preamble speaks of "neutralization" as descriptive of the *régime* introduced by Art. VIII of the Treaty of 1850. As we have seen, all that Art. VIII established was a scheme of joint protection on certain conditions. The negotiators in 1901 appear to have mistaken that for a scheme of absolute guaranteed equality, and to have thought that for such a *régime* "neutralization" was an appropriate term!

If we can impute to them such crass disregard of the terms of the treaty they professed to be modifying or replacing, then we may take "neutralization" in Art. III of 1901 to mean the same thing as "neutralization" in the preamble, *i. e.*, a system of international equality in the use of the canal.

Needless to say, this is a highly improper use of the term "neutralization". Needless to say, no such *régime* was contained in Art. VIII of 1850. But if the negotiators of 1901 thought it was, it is just possible to hold that—with regard to a Central American canal—Art. III of 1901 imposes a positive obligation to charge equal tolls. Its reference to a "basis of neutralization" would be, in that case, a clumsy way of stating the terms on which the canal was to be preserved for international use on equal terms, free *inter die,* from warlike interruption. But it must be repeated, this is an entirely forced construction which seems to strain language to the breaking point.

Supposing, lastly, that the considerations now adduced are incorrect: that in spite of the clearest indications to the contrary, the treaty does include Panama, and does import a positive en-

gagement to charge equal tolls, is that engagement infringed by the legislation of the United States?

As above indicated, I do not think that the fact of having acquired the soil of the canal can release the States from their obligations—whatever they are (and I think they are exceedingly slender)—in respect of it. Nor does there seem to be any weight in the argument which would exclude the United States, from the outset, from coming within the equality clause. It runs:

"The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable."

The requirements are put in quite an impersonal form. "All nations" are to be equal in the canal. It is not that the United States will treat all nations equally—but that "all nations" shall be equal there. The use of the word "citizens" is instructive in this connection. It is not impossible that it might be intended to refer to France or other republics. But it strongly suggests that the people of the United States were in the mind of the negotiators.

Nor can we admit the argument that, even if United States' vessels are generally included in the clause, there is a tacit exception of the coasting trade. Such a tacit exception is not usual: it has never, in fact occurred. Coasting traffic is always expressly excepted (if it is intended to except it) from the operation of treaties of commerce. And, internationally, it is improbable that a voyage from New York to San Francisco would be looked upon as a "coasting" trade, whether it passed through the Straits of Magellan or traversed the canal. Certainly, a voyage from Liverpool to New Zealand would not be any the more a coasting voyage because the ship refrained from touching at Rio, or because she did touch at Cape Town.[2]

But would a rebate to United States' shipping passing through the canal be fair?

Certainly it seems difficult to see how there can be any objection to this in principle. So long as the tolls are fair—that is, so long as they are not greater than is required to cover the cost of construction, working and maintenance of the canal, who can

[2] Cf. to cases collected in *Law Magazine and Review,* London.

complain if the United States choose to make presents to their own shipping? The Oxford Professor of International Law (for whose opinion everyone must have high respect, urges in a recent address delivered before that University, that the provisions of every commercial treaty would be liable to be evaded, and its promised equality denied, if a nation were at liberty to impose high duties impartially, and to grant rebates to favored nations. But no such situation arises in a case like the present, where the proper amount of its tolls is ascertainable by calculation at a definite sum. All nations, in proportion as they use the canal, must bear an equal share in meeting its cost. But there is no reason to imply a further undertaking that they will not encourage their own shipping to use the canal—or, for the matter of that, to refrain from using it. Is it suggested that Great Britain may not deter its ships by penalties from using the canal?

It may be concluded, therefore, that the canal lies, like the Panama Railway, outside the scope of the Clayton-Bulwer Treaty and of the Hay-Pauncefote Treaty which took its place,—that the supposed stipulation for equal tolls is nothing but a condition of neutral treatment in war-time,—and that there is nothing repugnant to the terms of this condition in a rebate to American shipping using the canal.

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